usurpation of the jury's function." The first theory, says Mr. Wigmore, leads to the "exaltation of the ordinary rules of evidence, which are the mere instruments of investigation, into an end in themselves." The second fails to recognize that the jury has always acted under the supervision of the court, and leads to the curious result that the appellate court may overturn a decision of the jury as against the weight of the evidence, but may not consider a particular piece of evidence, so as to say that it would not have affected the same weight of evidence.

As to the practical results of the "Exchequer heresy," the writer forcefully shows that "it has done more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling." Reform is possible, but not by legislation alone; that has been tried in New York and New Jersey, and has failed. There must be, as in England, a "change in spirit." Particularly, says Mr. Wigmore, must the judges no longer be merely umpires at the game of litigation, mere automata. Likewise the "maudlin sentimentality of judges in criminal cases must cease."

THE FELLOW SERVANT DOCTRINE. — A recent article discusses the various attitudes of the United States Supreme Court on the liability of employers for the negligent injury of servants by fellow servants, and endeavors to expound an ultimate test that may best explain past decisions and guide the future. *The Fellow Servant Doctrine in the United States Supreme Court*, by Albert M. Kales, 2 Mich. L. Rev. 79 (Nov., 1903). The earliest theory, according to this writer, upon which the master's non-liability was rested by this court, was that the "servant assumed the risk of the negligence of his co-employee"; but as he obviously did not assume a risk in every case, this test gave way to one based upon the negligent employee's relation to the plaintiff. This in turn proving inadequate, was succeeded in later cases by the conception that the employer's liability must rest, not on the failure of the employee to assume the risk, but on the breach of a positive legal duty owed by the master. This duty is determined rather by the character of the act in the doing of which the negligence occurred than on the relation of the employees to each other. On this line of thought the court has often declared it to be the "duty of the master to use due care to furnish reasonably safe appliances and a reasonably safe place" in which to work. The writer then endeavors to show that in some cases the court has gone beyond this test in holding the master liable, though it has not expressed the principle on which it proceeded. And so Mr. Kales suggests an ultimate formula, which he considers to be supported by the actual decisions and to accord with the present attitude of the court. This formula requires from the employer due care to provide all permanent conditions of safety — as distinguished from those merely incidentally necessary — for his servants, and so when the negligence of a fellow servant occurs in respect to an act done in discharge of this duty, there is a violation of the master's duty. *Cf.* 16 HARV. L. REV. 593. Mr. Kales' treatment is valuable for its exhaustive and accurate historical analysis of the decisions of the Supreme Court upon the fellow servant doctrine.

SUBSEQUENT BIRTH OF CHILDREN AS A REVOCATION OF A WILL. — Under this title the Virginia Law Register contains, in two numbers, a comprehensive and careful survey, by Mr. Marvin H. Altizer, of the statutes of pretermission which obtain in most American states, and of the cases which interpret these statutes. 9 Va. L. Reg. 473, 519 (Oct. & Nov., 1903). These provisions giving rights to a testator's children born after the will was made are discussed, first, with reference to the circumstances necessary for their operation, and, second, as to their effect. The principal questions arise under the first head, and per-